BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JENNIFER L. LOGSDON Claimant	)	
VS.	)	
GEC PRECISION CORPORATION Respondent	)	Docket No. **237,856**
AND	)	
ZURICH INSURANCE CO. Insurance Carrier	)	

ORDER

The respondent requested review of the Award dated May 17, 2000, entered by Administrative Law Judge Jon L. Frobish. The Workers Compensation Board heard oral argument on November 17, 2000.

APPEARANCES

Claimant appeared by her attorney, Robert R. Lee. Respondent and insurance carrier appeared by their attorney, Stephen J. Jones.

RECORD & STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded the claimant a 30.5 percent work disability by averaging a 21 percent task loss with a 40 percent wage loss.

On review the respondent contends that benefits should be limited to a scheduled injury to the right upper extremity. Furthermore, the respondent argues that the claimant did not make a good faith effort to obtain employment.

The claimant contends that the award of the Administrative Law Judge should be affirmed.

FINDINGS OF FACT

After reviewing the record, considering the briefs and hearing the parties arguments, the Board makes the following findings:

The claimant started working for the respondent on June 7, 1997, as a punch press operator. The claimant's job duties required her to change the dyes on the press. Each dye consisted of two parts and each separate part could weigh from 5-60 pounds. After the dyes were in place, the claimant would then take a sheet of metal weighing from 5-10 pounds and insert it into the press.

On December 2, 1997, the claimant was replacing a dye. The claimant set the dye on a table and as she did so the entire table fell over. The claimant tried to catch the dye and it landed on her right arm. The claimant immediately reported the injury to her supervisor. The claimant continued to work for a while but as she ran the machine she began to experience additional discomfort.

The next day the claimant went to the emergency room with complaints of neck discomfort and pain radiating from her shoulder into her elbow with numbness from the elbow down. The claimant was off work for a day following the injury on December 2, 1997, and when she returned to work she was placed on light-duty work operating a computer for approximately a month.

The claimant returned to her regular job as a punch press operator and as time passed, she began to experience additional complaints not only with her neck, right arm and shoulder but the left arm and shoulder also began to bother her. The claimant requested additional medical care and, in the interim while waiting for approval from the respondent, she sought treatment on her own with a chiropractor.

The claimant was moved to a deburring machine which made her entire right arm more painful and she was then transferred to the paint shop which required her to get parts ready to be painted.

Following the injury, the claimant initially was treated by Dr. Anderson who provided anti-inflammatory medications and released the claimant on August 15, 1998. The claimant had also sought chiropractic treatment and was given cervical manipulations. The

claimant was referred to Dr. Dobyns on September 25, 1998, and treated with a cortisone injection and occupational therapy.

The claimant was terminated from respondent's employment on October 28, 1998. It was claimant's uncontroverted testimony that she was being terminated because of lost time. When the claimant inquired if it had anything to do with her doctors appointments that were scheduled during her work hours, the supervisor did not respond. The claimant's uncontroverted testimony was that she did not miss any work except for doctors appointments that she had as a result of her work-related injury.

Following her termination, the claimant obtained employment with the Arkansas City Police Department as a dispatcher working 40 hours per week for a salary of $7.50 an hour. The claimant terminated that employment and subsequently obtained employment as a cashier with Wal-Mart super center working 35 hours a week making $5.35 an hour. The claimant quit this job in August 1999 because it was too far to drive and she obtained employment as a cashier at an Amoco service station working 27 hours a week for $5.75 an hour. The claimant testified that she continues to look for better employment and had applied for work at a bank, at Montgomery Elevator, at Good Time Productions and Ellsworth Motor Freight.

At the regular hearing, the claimant was complaining of pain in her right shoulder blade and joint, stiffness in both sides of her neck and numbness and tingling in the fingers of her right hand.

During the course of litigation, Dr. Melhorn was designated the claimant's treating physician. Dr. Melhorn noted that upon the initial visit the claimant had pain in her right upper extremity, hand, wrist, elbow and shoulder as well as complaints in her neck.

The record consists of the testimony of three physicians. Dr. Murati, who saw claimant at her attorney's request, diagnosed the claimant with right hand pain secondary to right carpal tunnel syndrome and ulnar cubital syndrome confirmed by nerve conduction studies of the claimant's right upper extremity. The doctor further diagnosed neck pain secondary to strain and right shoulder pain secondary to mild rotator cuff strain and crepitus. Dr. Murati imposed restrictions against crawling or heavy grasping, occasional repetitive grasp/grab and above the shoulder work with her right shoulder, frequent repetitive hand controls and lift/carry/push/pull of occasionally 20 pounds frequently 10 pounds and constantly 5 pounds. The doctor further imposed restrictions against work more than two feet away from the body with the right arm. Lastly, the claimant should avoid awkward positions of the neck. Dr. Murati rated the claimant with a 6 percent upper extremity impairment for shoulder crepitus, a 10 percent upper extremity impairment for carpal tunnel syndrome and a 10 percent upper extremity impairment for ulnar cubital syndrome. The upper extremity impairments combine for a 24 percent which convert to a 14 percent whole person impairment. For the claimant's cervical strain, the doctor rated the claimant at 4 percent and using the combined value charts came up with a total whole body impairment rating of 17 percent.

Dr. Melhorn imposed restrictions of medium level work with a 50-pound maximum and 25-pound frequent restriction with the additional restriction limiting power and vibratory tool exposure on the right. Dr. Melhorn rated the claimant at 7.05 percent to the right arm.

Dr. Mills diagnosed the claimant with cervical sprain and mild right carpal tunnel. He imposed restrictions of medium level work of 50 pounds for a maximum lift, 25 pounds frequently and limited power and vibratory tools on the right. Dr. Mills rated the claimant at 6 percent to the right upper extremity for crepitus and an additional 5 percent for sensory loss and 1 percent for cervical strain and concluded that the claimant had a 10 percent whole body functional impairment.

Jerry Hardin testified on the claimant's behalf that the claimant had made a good faith effort to find appropriate employment and in his opinion the claimant had the current ability to earn $6 an hour. After interviewing the claimant, Mr. Hardin prepared a task list history that contained 26 tasks the claimant had performed in her prior 15-year work history.

Karen Crist Terrill testified on respondent's behalf and opined that the claimant had the ability to earn $7 an hour. Ms. Terrill further, after consultation with the claimant, developed a task loss list of 29 tasks that the claimant had performed in her prior 15-year work history.

Dr. Murati opined that the claimant could not perform 6 of the 26 tasks listed by Mr. Hardin which results in a 24 percent task loss. Dr. Melhorn opined that based on Ms. Terrill's task list the claimant could not perform 3 of 29 tasks which results in a 10 percent task loss.

Dr. Mills testified that using the task list compiled by Mr. Hardin the claimant could not do 3 of the 26 tasks which results in a 12 percent task loss. When the doctor utilized the list of tasks compiled by Ms. Terrill, he concluded the claimant could not perform 6 of 29 tasks which results in a 21 percent task loss.

CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition to the stipulations of the parties, the Board makes the following conclusions of law:

Initially, the respondent contends that claimant has only established that she sustained injury to her right upper extremity and her benefits should be limited to a scheduled disability. The respondent relies upon the determination by Dr. Melhorn that the claimant had sustained no permanent impairment to her cervical spine.

The claimant's medical history indicated complaint of neck pain contemporaneous with the injury. During the extended course of treatment, the claimant has consistently

complained of pain to her right arm and right shoulder, as well as her neck. The claimant continues to complain of neck pain. Both Drs. Murati and Mills gave the claimant a general body impairment which included a permanent functional impairment rating to the claimant's neck. The claimant has met her burden of proof to establish that as a result of her work-related injury, she sustained a whole body functional impairment of 10 percent.

Because claimant suffered an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1998 Supp. 44-510e, which provides in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of Foulk[1] and Copeland.[2] In Foulk, the Court of Appeals held that a worker could not avoid the presumption of having no work disability contained in K.S.A. 1988 Supp. 44-510e (the above quoted statute's predecessor) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. Neither the presumption nor the wage earning ability test are in the current statute, but in reconciling the principles of Foulk to the new statute, the Court of Appeals in Copeland held that for purposes of the wage loss prong of K.S.A. 44-510e, a worker's post-injury wages should be based upon his or her ability rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from the injury.[3]

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the

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[1] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140, *rev. denied* 257 Kan. 1091 (1995).

[2] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[3] *See* Gadberry v. R. L. Polk & Co., 25 Kan. App. 2d 800, 802, 975 P.2d 807 (1998).

> evidence before it, including expert testimony concerning the capacity to earn wages.[4]

The award of the Administrative Law Judge determined that although the claimant appeared to make a good faith effort to find employment she had not made a good faith effort to find full-time employment. The Administrative Law Judge then imputed a wage to the claimant for the wage loss prong of the work disability test.

Following her termination with the respondent, the claimant initially obtained a job working with the Arkansas City Police Department as a dispatcher making $7.50 an hour. She subsequently left that 40-hour a week job and obtained employment as a cashier working a 32-hour week and then she changed jobs once again finding employment as a cashier working a 27-hour week. The claimant noted that she had been looking for better employment but admitted that she had only applied for work at four businesses. There were no medical restrictions that would prevent the claimant from working a 40-hour work week and the Board concludes that she has not made a good faith effort to find and/or retain full-time employment. Therefore, her actual wage will not be used to determine wage loss. Instead, a wage will be imputed based upon her capacity to earn wages.

Mr. Hardin testified the claimant should be able to make $6 an hour and Ms. Terrill testified the claimant had the ability to earn approximately $7 an hour. The Administrative Law Judge averaged the two opinions and concluded that the claimant has the ability to earn $6.50 an hour for a 40-hour work week. This determination fails to consider the fact that immediately after her termination the claimant obtained employment earning $7.50 an hour with the Arkansas City Police Department. The claimant demonstrated that she had the capability to earn $7.50 an hour and there is no evidence in the record that she left that employment due to her medical restrictions imposed as a result of her work-related injury. Therefore, based upon the claimant's demonstrated capacity, the Board will impute a wage of $7.50 an hour for a 40-hour work week. This yields an average weekly wage of $300 which compared with the average weekly wage at the time of the injury results in a wage loss of 31 percent.

The range of task loss among the three doctors includes Dr. Mills' 12 percent task loss using Mr. Hardin's list and Dr. Mills' 21 percent using Ms. Terrill's list. Dr. Murati opined the claimant's task loss was 24 percent using Mr. Hardin's list and Dr. Melhorn opined the claimant's task loss was 10 percent using Ms. Terrill's list.

Because Dr. Mills was provided the opportunity to use both Mr. Hardin and Ms. Terrill's task loss lists, the Board will adopt his opinion as being the most comprehensive regarding the claimant's task loss. As previously noted, Dr. Mills opined that the claimant had a task loss of 12 percent utilizing Mr. Hardin's list and a task loss of 21 percent utilizing Ms. Terrill's list. Giving equal weight to the task loss lists, it is the determination of the

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[4] Copeland at 320.

Board that the claimant has met her burden of proof to establish that she has a 16.5 percent task loss.

Combining the 16.5 percent task loss with the 31 percent wage loss results in a work disability of 23.75 percent.

AWARD

WHEREFORE, the Board finds the Award dated May 17, 2000, entered by Administrative Law Judge Jon L. Frobish should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jennifer Logsdon and against the respondent, GEC Precision Corporation and its insurance carrier, Zurich Insurance Company for an accidental injury which occurred October 28, 1998, and based upon an average weekly wage of $436.95.

The claimant is entitled to 98.56 weeks at $291.31 per week or $28,711.51 for a 23.75 percent permanent partial general bodily disability which is due, owing and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of March 2001.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

Copies to:

Robert R. Lee, Attorney at Law
Stephen J. Jones, Attorney at Law
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Workers Compensation Director